

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-500-01
VATaverna

date:

to: John Petito, Territory Manager
Retails/Food/Pharmaceuticals
Attn: Revenue Agent Rupnath Shivdhan

from: Area Counsel (Financial Services & Healthcare) (Area 1 - Manhattan, NY)

subject:

Form SS-10 - Tax Year

Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17

DISCLOSURE STATEMENT

This advice may contain return information subject to I.R.C. § 6103. This advice may contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be

relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we provide you with the appropriate language to use on Form SS-10 (Consent to Extend the Time to Assess Employment Taxes) to extend the statute of limitations on assessment of the employment taxes of [REDACTED] for the taxable year [REDACTED]. The statute of limitations on assessment currently expires on [REDACTED].

Issues

1. Which entity is the proper entity to enter into a consent to extend the statute of limitations on assessment of the taxpayer's employment tax liabilities (Form SS-10) for pre-merger tax years?

2. What specific language should be used on the Form SS-10?

Facts

[REDACTED] ("[REDACTED]") is a Delaware corporation. [REDACTED] timely filed Forms 940/941 with respect to its [REDACTED] employment tax liabilities. You are presently conducting an examination of [REDACTED]'s employment tax liabilities for taxable year [REDACTED].

[REDACTED] ("[REDACTED]") is a Delaware corporation. [REDACTED] is wholly-owned by [REDACTED] ("[REDACTED]"), a Delaware corporation. On [REDACTED], [REDACTED], [REDACTED], and [REDACTED] entered into an Agreement and Plan of Merger ("Agreement").

Pursuant to the Agreement, [REDACTED], which was created solely for the purpose of acquiring [REDACTED], merged with and into [REDACTED]. [REDACTED] was the surviving corporation and [REDACTED] ceased to exist. Accordingly, [REDACTED] became the wholly-owned subsidiary of [REDACTED].

Discussion

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form SS-10. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

1. Which entity is the proper entity to enter into a consent to extend the statute of limitations on assessment of the taxpayer's employment tax liabilities (Form SS-10) for pre-merger tax years?

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and

the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

Unlike the income tax liability of a consolidated group, where, as a general rule, the common parent acts as sole agent for each member of the group, each member of a consolidated group must act on its own behalf with respect its own employment tax liabilities. See I.R.C. § 1501 and the regulations thereunder. Each member is, therefore, responsible for entering into its own consent to extend the statute of limitations with respect to its employment tax liabilities. In the case of merged corporations the surviving or resulting corporation in a merger under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 488; See also Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

Here, the Agreement provides that [REDACTED] survived the merger between [REDACTED] and [REDACTED]. Therefore, [REDACTED] is the proper party to execute the Form SS-10 relating to [REDACTED]'s [REDACTED] employment tax liabilities.

The Form SS-10 should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of [REDACTED]. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

2. What specific language should be used on the Form SS-10?

The caption of the Form SS-10 extending the statute of limitations for [REDACTED]'s employment tax liability for the [REDACTED] taxable year should read as follows:

"[REDACTED] (EIN #)"

The EIN of [REDACTED] should be entered in the upper right hand corner of the Form SS-10.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 264-1595, ext. 211.

ROLAND BARRAL
Area Counsel
(Financial Services and
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By: _____
THEODORE R. LEIGHTON
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